SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

Docket No. 71-1181

IN THE MATTER OF THE APPLICATION
OF
ELSIE H. FLANAGAN and NINNA MURRAY,
Petitioners,

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,
Respondents.

Petition for a Writ of Certiorari to the Appellate Division, Third Department, of the State of New York.

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vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK,

Respondents.

TO THE HONORABLES, THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Appellate Division, Third Department, of the State of New York.

The petitioners above named respectfully pray that a writ of certiorari issue in the above-captioned case, directed to the Appellate Division, Third Department, of the State of New York, to review its order dated De-

cember 24, 1971, and entered in the office of the clerk of that court on December 24, 1971 (28).*

Opinions Below.

The only opinion (22) below was that rendered by the Supreme Court, Albany County, which was handed down on June 11, 1971, and reported in 66 Misc. 2d 736. The opinion on the motion for reargument was handed down on July 9, 1971, and is not officially reported.

The Appellate Division, Third Department, affirmed the order dated June 11, 1971, without opinion.

By order, dated February 16, 1972, petitioners' motion for leave to appeal to the Court of Appeals was denied.

By order, dated February 10, 1972, respondent's motion to dismiss the appeal taken by the petitioners was granted by the Court of Appeals on the ground that no substantial constitutional question is directly involved.

Jurisdiction.

The order of the Appellate Division, Third Department, was dated and entered on February 9, 1972. The jurisdiction of this honorable court is invoked under Title 28, United States Code, Section 1257.

Proceedings Below.

This proceeding under Article 78 of the Civil Practice Law and Rules was commenced by the service of a petition on or about the 13th day of May, 1971.

*Parenthetic references are to the Appendix hereto unless otherwise noted.

The motion by the Commissioner of Education of the State of New York to dismiss the petition was made on May 25, 1971, and the motion to intervene and dismiss was made on May 26, 1971.

Petitioners appealed to the Appellate Division, Third Department, from a judgment entered in the office of the Clerk of the County of Albany on the 7th day of July, 1971, which dismissed the petition herein on the merits to review a judicial decision of the Commissioner of Education, dated March 23, 1971 (No. 8256), which decision dismissed an appeal by the petitioners herein and one Charlotte Harris from the action taken at a school election in School District No. 6 in the Town of Southampton.

Questions Presented.

1. Whether the legislature in granting to all qualified voters of the Village and Town of Southampton absentee voting pursuant to the 1947 constitutional amendment providing for absentee voting in elections other than general elections but failed to specifically extend the same privilege and convenience to all qualified voters in the Town of Southampton School District No. 6 election violated the Equal Protection Clause of the federal and state constitutions.

2. Whether the learned Special Term erred in holding that, in a proceeding in the nature of mandamus, a hearing was not required to be held where, among other things, the petitioners sought to establish the wide disparity between school districts in the Towns of Southampton and Riverhead in the disbursement of funds for each student and that fiscal dependence of school boards in Union Free School Districts on school real estate taxes

based on property assessments made by the Town Assessors does not enable them to carry out the constitutional mandate to provide equal educational opportunity for all children.

3. Whether the provisions of the constitution and the Election Law, which provide for absentee voting, are restricted in their application to absentee voting at a general election.

4. Whether a school district election, not being held at the time of a general election and not being a special election conducted under the Public Officers Law, does not qualify for the use of an absentee ballot.

Constitutional Provisions Involved.

United States Constitution, Fourteenth Amendment;
New York State Constitution; Article I, Section 2;
New York State Constitution, Article I, Section 11.

New York Statutes Involved.

Village Law, Section 4-445, L. 1967, c. 735;
Town Law, Section 84(4,5), L. 1968, c. 248 (1);
Election Law, Sections 117 and 117a:
Public Officers Law, Section 42;
Education Law, Section 2609(1).

Statement of Case.

On October 31, 1970, the Board of Education of Union Free School District No. 6, Town of Southampton, presented to the voters for their approval a comprehensive building program. The program involved constructing an addition to the existing high school building and utiliz-

ing the resulting structure as an intermediate school, and the construction of a new high school building on land already owned by the district. The voters were asked to approve this plan and the funding thereof through the sale of bonds at a total cost of $8,985,000. This plan was presented as a single proposition at a special district meeting held on October 31, 1970.

Notice of the meeting was published in the "Southampton Press" on October 1, 8, 15, 22, 29, 1970.

The final voter registration rolls listed 2,994 registered voters of whom 2,245 voted at said meeting. A total of 1,238 votes were cast in favor of the proposition, 948 votes were cast against, and 59 ballots were blank.

The Commissioner of Education rejected all of the contentions of the petitioners and found that on the present state of the pleadings no triable issues of fact existed, the resolution of which in favor of the petitioners would leave no rational basis for the decision of the Commissioner of Education, and ruled as follows:

1. That there is no provision for the use of absentee ballots in a school district election.

2. That the voters were not deprived of statutory and constitutional rights by virtue of the submission of a joint proposition which did not enable them to vote on each part of the proposition separately.

3. That the action of the Board of Education in using funds and facilities of the district in promoting the adoption of the building program was valid.

4. That the publication of the notice of a special district meeting in one newspaper instead of two was valid in the existing circumstances and that the omission to publish in two newspapers was not willful or fraudulent.

Reasons for Allowance of the Writ.

Petitioners urge the following reasons for the allowance of the writ:

1. The Equal Protection clause requires that the State provide the privileges and conveniences of absentee voting and registration to all qualified voters in the Southampton School District in a manner that does not violate the law of Equal Protection.

The constitution contains separate, differently worded provisions for absentee *voting* and absentee *registration*.

Article II, Section 2, gives the legislature broad authority to establish procedures for absentee voting.[1] The legislature is authorized to establish absentee voting procedures for qualified voters who fall within two categories:

1. Those who may be absent from the county of their residence (or, if residents of New York City, from the city).

[1]The section provides: "The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes."

2. Those who may be unable to appear personally at the polling place because of illness or physical disability.

Article II, Section 5,[2] *requires* that voters who fall within the following categories be permitted to register by absentee registration rather than in person:

1. Those who are unable to appear personally for registration:

—because of illness or physical disability (regardless of location).

—because of their duties, occupation or business require them to be outside the counties of the residence (or, in the case of residents of New York City, outside the city).

2. Those who are in military service or are inmates of veterans' hospitals (regardless of location).

3. A spouse, parent or child of a voter in any of the foregoing categories, accompanying or being with him

[2]That section, as amended in 1966, provides, in part, that "* * * voters who are in the actual military service of the state or of the United States, in the army, navy, air force or any branch thereof, or in the coast guard, or inmates of a veterans' bureau hospital and voters who are unable to appear personally for registration because of illness or physical disability or because of their duties, occupation or business require them to be outside the counties of their residence or, in the case of residents of the city of New York, their duties, occupation or business require them to be in a county outside such city; and a spouse, parent or child of such a voter in the actual military service or of such an inmate or of such a voter unable to appear personally for registration, accompanying or being with him or her, if a qualified voter and a resident of the same election district, and if outside of the county of such election district, shall not be required to register personally."

or her, if a qualified voter and a resident of the same election district, and if outside the county of such election district.

Although the constitutional language on absentee registration is drafted as an exception to the provisions on annual personal registration in Article II, Section 5, it has also been regarded as being applicable to the provisions on permanent personal registration in Article II, Section 6.

The legislature has adopted legislation establishing procedures for absentee voting in general elections and in village elections.[3] In special elections, absentee ballots are provided only for military personnel.[4]

The legislature has made provision for absentee registration for all state elections.

From 1846 until 1966, Article II, Section 1, of the Constitution included as a qualification for voting that a person vote "in the election district of which he * * * shall at the time be a resident and not elsewhere."[5]

[3]Election Law, §§ 117, 117-a, 302; Village Law, §4-444. Absentee ballots are authorized by Election Law, §302, for military voters who are absent from their election *district*, although effective January 1, 1967, the Constitution expressly authorized absentee voting only for persons (unless ill) who are absent from their home *county* (or from New York City).

[4]Election Law, §302.

[5]1846 Constitution, Article II, Sec. 1. This language was deleted in the amendment to Article II, Sec. 1, which was approved by the voters in the general election of 1966. From 1864 to 1966, Article II, Sec. 1, also contained a mandatory absentee voting provision applicable to military voters absent from the election district. See 1938 Report XI, pp. 166-7. The latter provisions were amended in 1938 and 1951.

The present absentee voting provisions originated in 1919. An amendment that year permitted, but did not require, the legislature to provide absentee voting for

> "* * * qualified voters who may, on the occurrence of any general election, be unavoidably absent from the state or county of their residence because their duties, occupation or business require them to be elsewhere within the United States."[5]

By successive amendments, this provision was expanded to its present inclusive form.[6]

Until 1951, the Constitution contained no provision on absentee registration. At that time, a provision on absentee registration for servicemen and patients in veterans' hospital, and their families was added.[7] This provision was amended in 1955 to cover voters unable to appear personally because of physical infirmity, or because their "duties, occupation or business" required them and their families to be outside the state. The provision was amended again in 1966, to permit a person to register *in absentia*, if absent from the county of his residence (or from New York City) for one of the specified reasons, as well as if absent from the state.

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[6]The most important changes were effected in 1947, 1955 and 1963.

[7]The 1951 provision, which amended Article II, Sec. 5, read as follows:

> "* * * but voters in the actual military service of the state, or of the United States, in the army, navy air force or any branch thereof, or in the coast guard, or an inmate of a veterans' bureau hospital located outside the state of New York, and a spouse, parent or child or such voter in the actual military service or of such inmate, accompanying or being with him or her, if a qualified voter and a resident of the same election district, shall not be required to register personally, and an application for an absentee ballot shall constitute personal registration whenever such registration is required."

Article II, Section 2, authorizes the legislature to establish absentee voting procedures for persons who, for any reason, are absent from the county of their residence (or from New York City), and for persons (regardless of their location) who are sick or disabled. This provision could be construed as preventing the legislature from authorizing absentee voting in cases outside these two categories—for example, in the case of voters who are absent from their election district but not from the county of their residence.[8]

Absentee voting is an administrative matter.

Specific provisions on absentee voting and absentee registration are contained in the Constitution. At the present time, there are the following differences between the two provisions:

1. The absentee voting provisions authorize, but do not require, absentee voting. By contrast, the provisions on absentee registration are mandatory.

[8]Until 1966, Article II, Sec. 1, prescribing the qualifications for voting, provided that a qualified voter could vote "* * * in the election district of which he or she shall at the time be a resident, and not elsewhere." This provision precluded the legislature from providing for absentee voting, except pursuant to specific constitutional authorization. This language, however, was removed in 1966 from the Constitution. Article II, Sec. 2, relating to absentee voting, was nevertheless retained. This, arguably, suggests that Article II, Sec. 2, is intended not merely to authorize the legislature to establish absentee voting in certain cases, but to bar the legislature from prescribing absentee voting in cases not within the scope of that provision. On the other hand, it might be contended that the 1966 amendment of Article I, Sec. 1, entitling qualified voters to vote "at every election for all officers elected by the people and upon all questions submitted to vote of the people," was intended to give the legislature unrestricted discretion over absentee voting; this interpretation, however, makes Article II, Sec. 2, superfluous.

2. The absentee voting provisions permit the legislature to authorize a person who is absent from the county of his residence (or from New York City) for *any* reason to vote by absentee ballot. The absentee registration provisions authorize absentee registration for a person who is absent from the county of his residence (or from New York City) only if his "duties, occupation or business" requires him to be elsewhere—thus, for example, precluding absentee registration by a person who is absent on vacation.[9]

3. The absentee voting provisions are relatively simple, whereas the absentee registration provisions are extremely complex and detailed.

School districts are as much an integral part of the state as villages or towns. The state has chosen to extend the benefits of absentee voting and registration to all qualified voters who reside in cities, towns and villages, and, more particularly, the Village and Town of Southampton. Failure to extend these benefits to all qualified voters in the Southampton school district is an act of discrimination. Our state's concern for the rights of voters is clearly revealed in the suffrage article of the Constitution.

Rinaldi v. Yaeger, 384 U. S. 305, 310-311 (1966); *McMillan v. Board of Education of the State of New York*, 430 F. 2d 1145, 1149 (2nd Cir. 1970).

In each of the cases, the state action under attack did not on its face or in its purpose discriminate against the taxpayers. In each of these cases, the basic "right" which

[9]The statute permits absentee voting by persons absent on vacation: Election Law, §117(6); Village Law, §4-444.

was effectively impaired was one of the state creation, which nonetheless had to be extended equally to all. And in each of the above cases, the Supreme Court looked beyond the superficial uniformity and nondiscriminatory intent of state action to find a denial of equal protection where there was a discriminatory result, and effective deprivation of a basic personal interest. Like the above line of Supreme Court cases, the instant case involves state action which in its result bears particularly harshly upon the taxpayers with respect to their vital personal interests.

The law of equal protection has evolved that even if a state is pursuing a policy that it is not constitutionally obligated to follow it must nonetheless refrain from any discriminatory practices in executing that policy (see, e. g., *Griffin v. Illinois*, 351 U. S. 12 [1955]; *Douglas v. California*, 372 U. S. 353 [1963]; *Shapiro v. Thompson*, 394 U. S. 618 [1969]). Any classification drawn in executing such a policy must be based on a reasonable basis, *Dandridge v. Williams* (397 U. S. 471 [1970]), or a compelling state interest (*Shapiro v. Thompson, supra*).

The "right/privilege" characterization has been specifically rejected as being dispositive by various decisions of the United States Supreme Court (see *Sherbert v. Werner*, 374 U. S. 398, 404, 1963 [unemployment insurance]; *Shapiro v. Thompson*, 394 U. S. 618, 627, 1969 [welfare]; *Fleming v. Nestor*, 363 U. S. 603, 611, 1960 [disability insurance]; *Slochower v. Board of Education*, 350 U. S. 551, 555, 1956 [public employment]; *Bolling v. Sharpe*, 347 U. S. 497, 1954 [public education]).

In *Griffin v. Illinois* (351 U. S. 12 [1965]), and its progeny, the Supreme Court has made clear that it will look to the effect of state action for purposes of judging

its constitutionality where the effect was to discriminate against the poor in respect of their basic equal right to effective criminal appellate review. The court invoked a rigorous equal protection test to invalidate an Illinois provision which charged a single scale of fees to all persons who ordered criminal trial transcripts.

The Illinois requirement, neither by its terms nor its purposes, discriminated against the poor. However, the court looked to the effect of the requirements and concluded that the practical unavailability of transcripts to the poor denied them equal protection of the law and an equal right to an effective criminal appeal.

Accordingly, the Illinois court was directed to provide full and effective appellate review to indigents either by providing free transcripts or otherwise. The court held that the refusal to pay for the transcript of an indigent denied equal protection of the laws because even though the state was not constitutionally compelled to provide an appeal it could not do so in a way that discriminated against a person and denied him the benefit of that policy because of his poverty.

The court said on page 18:

> "It is true a state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all * * * But that is not to say that a state that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

In *Douglas v. California* (353 U. S. 535 [1963]), the Supreme Court applied this rigorous equal protection test to a California provision which, in the case of indigent appealing a criminal conviction, provided that the

appellate court would search the record to see whether it would be "of advantage to the defendant or helpful to the appellate court" to have counsel appointed for the appeal. The Supreme Court held that procedure unconstitutional; even though it uniformly gave to each individual the right to counsel on appeal if he could afford it and though the procedure served the otherwise legitimate state purpose of providing counsel only for non-frivolous appeals. Once again, the court looked to the impact of the procedure and held that once the right to appeal was granted the poor must have the same right to an appeal as the well-to-do.

Article II directs the legislature to provide a system of registration and, in establishing the procedures for voting, to preserve "secrecy in voting." It authorizes the legislature to provide for absentee voting and permanent personal registration. Bipartisan registration and election boards are mandated in any law "creating, regulating or affecting" such boards.

The State of New York, through its legislature, has accorded the qualified electors of the Southampton School District the right to vote upon the construction of a school, and upon the financing of a new school (Sec. 2021, subd. 7, of the Education Law; Sec. 37.00, Local Finance Law; Sec. 104.00, Local Finance Law).

Having exercised this plenary power and granted an election, not even the legislature can then provide for a system of voting that prevents or prejudices an elector from voting for a candidate or proposition of his choice without violating Article I, Section 1, of the New York State Constitution, and Article XIV, Section 1, of the Federal Constitution.

"No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers" (New York State Constitution, Article I, Sec. 1).

"No state shall * * * deny to any person within its jurisdiction the equal protection of the laws" (Amendment XIV, Sec. 1, Constitution of the United States of America).

Peo. ex rel. Hotchkiss, 206 N. Y. 231, 99 N. E. 568, which states that the legislature exercising the plenary power to prescribe the method of conducting elections cannot so exercise the power as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents an elector from voting for a candidate of his choice violates the constitution.

In *Callaghan v. Voorhis,* 252 N. Y. 14, 168 N. E. 447, the court held that regulations on voting become unconstitutional in violation of New York State Constitution, Article I, Section 1, when they unnecessarily and unfairly prejudice one class of voters.

In *Crane v. Voorhis,* 257 N. Y. 298, 178 N. E. 169, the court held that all voters within reasonable regulations must have the same opportunity to vote under the provisions of New York State Constitution, Article I, Section 1.

In re Cavellier, 159 Misc. 212, 287 N. Y. S. 739; *Lynn v. Nichols,* 122 Misc. 170, 202 N. Y. S. 401, aff'd 210 App. Div. 812, 205 N. Y. S. 935.

The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth

Amendment of the United States Constitution and Article I, Section 2, of the New York State Constitution.

In *McDonald v. Board of Election Commissioners*, 265 F. Supp. (N. D. Ill. 1967), the court said at page 818:

> "It is, of course, the right of the State of Illinois to impose reasonable restrictions on the availability of the ballot. The absence of statutory provisions to accommodate persons unable to be present at the polls on election day perhaps would pose no constitutional problem. But once the right to vote by absentee ballot has been provided, there must be no arbitrary or discriminatory denial."

In *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886), this court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." In *Reynolds v. Sims*, 377 U. S. 533, 561-62 (1964), this court said:

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

The right to vote is "close to the core of our constitutional system," *Carrington v. Rash*, 380 U. S. 89, 96 (1965), and "vital to the maintenance of democratic institutions." *Id.* at 94. It is "precious" and "fundamental." *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966). "(A)ny restrictions on that right strike at the heart of representative government." *Reynolds v. Sims, supra*, at 555. Neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray v. Sanders*, 372 U. S. 368, 380 (1963).

2. Due process of law required a hearing before the Commissioner of Education. Failure to conduct such a hearing is in violation of Section 6, Article I, of the New York State Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution.

One of the primary factors contributing to the great prestige attached to the office of the Commissioner of Education of New York State is its quasi-judicial power. In his quasi-judicial role, the Commissioner has been interpreted as an expert in education through whose decisions the educational program may be kept operating and not delayed by unnecessary court action.

The Education Law, Section 310, permits any person conceiving himself aggrieved by an action taken by any officer or school authority or meeting concerning any matter dealt with by the Education Law to appeal or petition to the Commissioner, who is authorized and required to decide the question raised if the complainant has sufficient legal interest in the matter. The types of complaints raised in the past include such matters as the formation or alteration of school districts and the designation of attendance zones within districts, the removal of teachers, admission and assignment of pupils and action on requests for use of school property. In deciding such appeals the Commissioner is not required to hold any quasi-judicial hearing.

Section 310 declares that the Commissioner's decision on appeals are "final and conclusive, and not subject to question or review in any place or court whatever." This provision has been construed to mean that the courts cannot weigh the Commissioner's decision unless it is shown that it was purely arbitrary, capricious or unreasonable. Unlike the decisions of many adminis-

trative agencies, it need not meet the test of being supported by "substantial evidence" (see, *Olson v. Board of Education,* 250 F. Supp. 1000 [E. D. N. Y. 1966]; *Lubell v. Nyquist,* 31 A. D. 2d 569, 294 N. Y. S. 2d 961).

There is no statutory provision or constitutional requirement that the Commissioner hold a hearing to determine whether the Board of Education exceeded the bounds of propriety by the improper and unlawful distribution of campaign letters to the voters and parents of school children or by improper and unlawful publication and distribution of an expensive and biased brochure or by the improper and unlawful use of district funds, property and facilities, teachers and pupils. However, in an appropriate case in a proceeding in the nature of mandamus, the court may direct a hearing to be held to determine whether there is a wide disparity between school districts in the Towns of Southampton and Riverhead in the disbursement of funds for each student and that fiscal dependence of school boards in Union Free School Districts on school real estate taxes based on property assessments made by the Town Assessors does not enable them to carry out the constitutional mandate to provide equal educational opportunity for all children.

Matter of Arcuri v. Macduff, 286 App. Div. 17;
Matter of Canada Dry Bottling Co. v. O'Connell, 284 App. Div. 370, aff'd 308 N. Y. 778;
Matter of Wignall v. Fletcher, 303 N. Y. 435, 440;
Matter of Newbrand v. City of Yonkers, 285 N. Y. 164, 174-176;
1 Benjamin on Administrative Adjudication in the State of New York, pages 354-356;
Jaffe on Administrative Law, pages 502, 503.

The real property tax is the biggest single source of local government revenues in New York State. Its use is regulated by numerous provisions of the Constitution,

such as those that limit the taxing and borrowing powers of localities and restrict the power of the legislature to prescribe exemptions. Administration of the tax is also regulated by constitutional provisions, such as those vesting the assessing function in cities, towns and villages and restricting its transfer.

The real property tax is by far the largest single revenue producer in the tax system of New York State and its local governments. It provides much more revenue, for example, than the combined yield of the personal income and retail sales taxes.

Revenues from the property tax, however, have not kept pace with the rising costs of local governments resulting from the expansion and existing services and the initiation of new ones required by social and economic advances. Meanwhile, large increases in state aid, new federal aid and local non-property taxes have been made available to fill the gap. These revenue sources have enabled localities to provide better services and have also in large part shifted the cost of many locally administered services to broader-based state and federal taxes with progressive characteristics.

Property taxes, as a result of these developments, are bearing a slowly declining share of total local expenditures. Nevertheless, they are still a large independent source of revenue for localities and they continue to furnish the practical basis for local participation in government affairs and home rule.

Costs of local government are expected to climb further in the foreseeable future, and property tax yields will have to move upward too if they are to continue in their traditional role. Whether the property tax can or

should be increased sufficiently to meet a large share of rising costs will be a basic question in considering constitutional proposals that would expand or limit the power of the legislature to make modifications in the tax.

In the six largest cities (Albany, Buffalo, New York City, Rochester, Syracuse and Yonkers), school taxes and debt are part of the overall city finances and must be fitted within the overall constitutional city tax and debt limitations.

School districts located wholly or partly in other cities have a constitutional limit on taxes for operating purposes ranging from 1.25 per cent to 2 per cent of the average full valuation and a debt limit of 5 per cent on the same base.

Districts outside the cities have no constitutional or statutory limits on property taxes, but do have a statutory debt limit of 10 per cent of current full value, with few exceptions.

Source: N. Y. State Comptroller, *Basic Data on Local Government and State-Local Relationships* (1967), page 51.

Conclusion.

Wherefore, petitioners respectfully request that this petition for a writ of certiorari be granted.

Dated: February 22, 1972.

Respectfully submitted,

BENNETT E. ARON,
ROY E. MONACO,
Attorneys for Petitioners.

BENNETT E. ARON,
Of Counsel.

APPENDIX.

Exhibit A.

Memorandum Decision on Motion for Leave to Intervene and Dismiss Upon Objections in Point of Law.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

[SAME TITLE.]

(Supreme Court, Albany County Special Term, June 11, 1971).
(Justice DeForest C. Pitt, Presiding)

Appearances:

Bennett E. Aron, Esq., Attorney for Petitioners.
Robert D. Stone, Esq., Attorney of Record for Respondent, Ewald B. Nyquist, Commissioner of Education of the State of New York.

Memorandum.

PITT, J.:

This Article 78 proceeding is brought to obtain judgment annulling the determination of the Respondent, Commissioner of Education, dismissing the petitioners' appeal before him. Petitioners seek to set aside an election held October 31, 1970, by the Union Free District No. 6 of the Town of Southampton, New York, which presented a comprehensive building program to the voters for their approval. The respondents have moved to dismiss the petition upon objections in point of law.

The said school district, not a party to this proceeding, has moved for an order allowing it to intervene.

The petitioners urge that the election should be set aside for the reason that no provision was made thereat for absentee ballots, with the alleged, possible result that certain voters were disenfranchised in violation of the New York State Constitution and provisions of the election law. Also urged is that the proposed building project should not have been presented as a single proposal. It is the petitioners' position that the Respondent, Commissioner, erred in his decision upon these issues and further erred in denying to the petitioners an opportunity to present oral testimony upon the hearing.

Section 311 of the Education Law grants to the Commissioner of Education the power to regulate the procedure to be employed in appeals brought before him. This the Commissioner has done. Part 376.2(d) of the Commissioner's Regulations states: "All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of all argument will be made." In *Matter of O'Brien v. Commissioner of Education,* 4 N. Y. 2d 140, the Court wrote at page 145: "Quite obviously, and we recently so held in a case very similar to the present one, the Commissioner of Education's resolution of a dispute on conflicting affidavits without an oral hearing neither directly involves the construction of the constitution nor poses a constitutional question of any kind." (See also: *Matter of Kuhn v. Commissioner of Education,* 1 A. D. 2d 533; *Matter of Savage v. Allen,* 13 Misc. 2d 489.)

Based upon the above and upon the nature of the issues presented at the hearing below the Court must conclude that the Commissioner did not err in the procedure employed by him.

With regard to the other objections raised by the petitioners the opinion of the Respondent, Commissioner, reflects a thorough consideration of the same and

a decision made in accordance with both reason and the authorities.

Consequently, the papers before this Court disclose no basis upon which the decision of the Commissioner may be disturbed, particularly in view of the limited area of judicial review available upon this proceeding. (*Matter of Vetere v. Allen*, 15 N. Y. 2d 259; *Matter of Board of Education of the City of New York v. Allen*, 6 N. Y. 2d 127; *Matter of Ocean—Hill v. Board of Education*, 23 N. Y. 2d 483.)

Accordingly, the respondent's motion to dismiss upon objections in point of law will be granted. The motion to allow intervention will also be granted so as to provide for the participation of the said school district in any further proceedings herein.

Submit order in accordance with the above.

Dated: Troy, New York.

Exhibit B.

Memorandum of Decision, Dated July 14, 1971.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

[SAME TITLE.]

(Supreme Court, Albany County Special Term, July 9, 1971.)

(Justice John H. Pennock, Presiding—referred to Hon. DeForest C. Pitt, for decision).

Appearances:

Bennett E. Aron, Esq., Attorney for Petitioners.
Robert D. Stone, Esq., Attorney for Respondent, Ewald B. Nyquist, Commissioner of Education of the State of New York.

Memorandum.

PITT, J.:

Upon a reading and examination of the supplemental briefs of all parties, and the papers submitted upon this motion for leave to reargue, it is this Court's considered opinion that the right to vote was not denied to any qualified voter in this school district. The failure to provide absentee ballots in a school election does not constitute a denial of equal protection of either federal or state laws. Section 117 of the Election Law does not apply to school elections and there is no provision for absentee ballots in the Education Law.

A comprehensive school building program can be presented to the voters of a school district as a single proposition. It is felt by this Court that the petitioners have not presented new issues of fact or law so as to allow for a reargument of this proceeding brought to set aside the determination of the Respondent, Commissioner of Education.

Motion for reargument submitted to the Special Term Supreme Court, Albany County on July 9, 1971, is denied without costs.

Submit order accordingly.

Dated: Troy, N. Y.
July 13, 1971.

Exhibit C.

Order.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Courthouse in the City of Albany, New York, commencing on the 15th day of November, 1971.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Walter B. Reynolds,
Hon. Louis M. Greenblott,
Hon. Michael E. Sweeney,
Hon. Richard D. Simons,
Associate Justices.

In the Matter

of

Elise H. Flanagan *et al.*,

Appellants,

v.

Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Respondent,

and

Board of Education of Union Free School District No. 6 of the Town of Southampton,

Intervenor-Respondent.

County Clerk's Index No. 3352-1971

The petitioners, Elise H. Flanagan *et al.* having appealed from a judgment of the Supreme Court of Albany County, entered on the 7th day of July, 1971, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Bennett E. Aron, Esq., of counsel for appellants, and by Robert D. Stone, Esq. (Lawrence W. Reich, Esq., of counsel) for respondent Ewald B. Nyquist, as Commissioner of Education of the State of New York, and by Thomas J. Bourke, Esq., of counsel for intervenor-respondent Board of Education of Union Free School District No. 6 of the Town of Southampton, and after due deliberation, the Court having rendered a decision on the 20th day of December, 1971, it is hereby

ORDERED that the aforesaid judgment of the Supreme Court of the County of Albany be, and the same hereby is affirmed, and the petition be, and the same hereby is dismissed without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: December 24, 1971.

Exhibit D.

Judgment.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

ELISE H. FLANAGAN *et al.*,

Appellants,

v.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Respondent,

and

BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 6 OF THE TOWN OF SOUTHAMPTON,

Intervenor-Respondent.

Index No. 3352-1971

The above named petitioners having moved in the Appellate Division, Third Judicial Department for permission to appeal to the Court of Appeals from an order of said Appellate Division affirming in all respects a judgment of the Supreme Court, Albany County, entered in the Office of the Clerk of Albany County on July 7, 1971, which said judgment denied in all respects the relief demanded in the petition herein and dismissed said petitioners' application to review and to annul, vacate

and set aside a decision of the Commissioner of Education, said order of affirmance by the Appellate Division, together with a judgment thereon having been entered in the Office of the Clerk of Albany County on December 27, 1971;

And said motion for permission to appeal to the Court of Appeals having been denied by said Appellate Division;

Now, on motion of Robert D. Stone, Counsel for respondent herein, it is hereby

ADJUDGED, that the motion of petitioners for permission to appeal to the Court of Appeals is denied, without costs.

Dated: Albany, New York
February 17, 1972

s/ JOHN S. BARTLETT, JR.
Albany County Clerk

Exhibit E.

Order.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, on the 17th day of January, 1972.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Louis M. Greenblott,
Hon. Michael E. Sweeney,
Hon. Richard D. Simons,
Hon. Walter B. Reynolds,
Associate Justices.

In the Matter

of

Elise H. Flanagan *et al.*,

Appellants,

v.

Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Respondent,

and

Board of Education of Union Free School District No. 6 of the Town of Southampton,

Intervenor-Respondent.

A motion having been made by appellants at this term of Court in the above-entitled proceeding for an order granting appellants permission to appeal to the Court of Appeals; now, after reading and filing proof of due service of the notice of motion, the affirmation of Bennett E. Aron, Esq., of counsel for appellants, dated the 3rd day of January, 1972, in support of the motion, and the affidavits of Thomas J. Bourke, Esq., of counsel for intervenor-respondent, dated the 12th day of January, 1972, and of James H. Whitney, Esq., of counsel for respondent, dated the 12th day of January, 1972, in opposition thereto, and the Court having rendered a decision on the 9th day of February, 1972, it is hereby

ORDERED that the motion of appellants for permission to appeal to the Court of Appeals is denied, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: February 16, 1972.

A True Copy:

JOHN J. O'BRIEN
Clerk

Exhibit F.

Order of the Court of Appeals of the State of New York.

COURT OF APPEALS.

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of February A. D. 1972.

Present,

Hon. Stanley H. Fuld, Chief Judge, presiding.

3

Mo. No. 104

IN THE MATTER

of

The Application of ELISE M. FLANAGAN and NINNA MURRAY.

Appellants.

For a Judgment &c.

vs.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York.

Respondent.

and

BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 6 OF THE TOWN OF SOUTHAMPTON, NEW YORK.

Intervenor-Respondent.

A motion having heretofore been made herein upon the part of the intervenor-respondent to dismiss the appeal taken by the appellants in the above cause to this Court, said motion having been joined in upon the part of the respondent, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal.)